

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

FEB 19 1998

In the Matter of	)	
	)	
Streamlining Broadcast EEO	)	
Rules and Policies, Vacating the EEO	)	MM Docket No. 96-16
Forfeiture Policy Statement	)	
And Amending Section 1.80 of	)	
The Commission's Rules to Include	)	
EEO Forfeiture Guidelines	)	

**OPPOSITION OF NATIONAL RELIGIOUS BROADCASTERS**

National Religious Broadcasters ("NRB") hereby submits its opposition to the petition of the American Center for Law & Justice ("ACLJ") seeking reconsideration of the Commission's Order and Policy Statement of February 25, 1998, in the above-captioned proceeding.<sup>1</sup> NRB has participated in earlier stages of this proceeding by filing both comments and reply comments in the docket.<sup>2</sup>

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<sup>1</sup> See *Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines*, MM Docket No. 96-16, FCC 98-19 (rel. Feb. 25, 1998) ("Order and Policy Statement"). This opposition is filed timely. See 63 Fed. Reg. 20633 (Apr. 27, 1998).

<sup>2</sup> See *Comments of National Religious Broadcasters*, MM Docket No. 96-16 (filed Apr. 30, 1996); *Reply Comments of National Religious Broadcasters*, MM Docket No. 96-16 (filed Oct. 25, 1996). As noted in NRB's original comments, the organization is a national association of radio and television broadcasters and programmers whose purpose is to "foster and encourage the broadcasting of religious programming." NRB Comments at 1, n.2. NRB members therefore are directly affected by the Commission decisions set forth in the

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NRB is filing this opposition for the limited purpose of rebutting ACLJ's contention that the Order and Policy Statement runs afoul of the notice-and-comment provision of the Administrative Procedures Act, 5 U.S.C. § 533(b). Specifically, ACLJ argues that the Order and Policy Statement is "unenforceable" because the Notice of Proposed Rulemaking in this proceeding lacked "*explicit* notice of the intention to change the rules with regard to religious broadcasters."<sup>3</sup> ACLJ provides no case citation for its broad contention that notice must explicitly set forth proposed regulatory changes. It relies instead on mostly decades-old cases that simply set forth the general purposes to be served by the notice-and-comment requirement.<sup>4</sup>

ACLJ has got the law wrong. Administrative agencies are not hamstrung in their rulemaking power by their prescience—or lack of it—in drafting a notice of proposed rulemaking that provides all possible permutations of a rule change. Indeed, as the D.C. Circuit has recently held,

[f]inal agency regulations need not mirror exactly those originally proposed. "To avoid 'the absurdity that ... an agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary' ... final rules need only be a 'logical outgrowth' of the proposed regulations."<sup>5</sup>

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(...Continued)  
Order and Policy Statement.

<sup>3</sup> ACLJ Petition at 2 (emphasis added).

<sup>4</sup> *See id.* at 3-5.

<sup>5</sup> *National Electrical Manufacturers Association v. EPA*, 99 F.3d 1170, 1172 (D.C. Cir. 1996) (citing *Shell Oil Company v. EPA*, 950 F.2d 741, 750-51 (D.C. Cir. 1991) (which cites *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n.51 (D.C. Cir. (continued...))

The Commission's decision to revise one aspect of its nondiscrimination rules as applied to religious broadcasters is clearly a "logical outgrowth" of the agency's 1996 Notice of Proposed Rulemaking.<sup>6</sup> In its initial paragraph, the Notice sets out the FCC's general "concern[ ]" that the agency's EEO rules "may unnecessarily burden broadcasters, *particularly licensees of small stations and other distinctly situated broadcasters.*"<sup>7</sup> The Notice addresses the Commission's own proposals to alleviate such burdens but also goes on—repeatedly—to "invite comment on ways to streamline the operation of the EEO Rule" for any or all broadcasters, whether "distinctly situated" or not.<sup>8</sup>

The Notice makes plain that (1) the Commission intended the proceeding to lead to the easing or elimination of unnecessary EEO regulatory burdens, (2) the FCC focused in particular on "small" and "distinctly situated" broadcasters, and (3) the agency "welcomed"

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1973)). See also, e.g., *National Black Media Coalition*, 822 F.2d 277 (2nd Cir. 1987); *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314 (4th Cir. 1980); *California Citizens Band Association v. United States*, 375 F.2d 43 (9th Cir.), cert. denied, 389 U.S. 844 (1967); *Small Refiner Lead Phase Down Task Force v. EPA*, 705 F.2d 506, 546-47 (D.C. Cir. 1983) (reviewing cases).

<sup>6</sup> *Streamlining Broadcast EEO Rule and Policies, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines*, MM Docket No. 96-16, FCC 96-49 (rel. Feb. 16, 1996) ("Notice").

<sup>7</sup> Notice at ¶ 1.

<sup>8</sup> *Id.* at ¶¶ 16, 17; see also *id.* at ¶ 49 (in its "Conclusion" paragraph, the FCC "welcomes any alternative proposals that might achieve the same purpose" of "minimizing undue paperwork burdens on broadcasters").

new proposals from commenters that were designed to serve the stated purposes.<sup>9</sup> NRB submitted comments that did just that—it urged the Commission to revise its religious nondiscrimination requirement as applied to “distinctly situated” religious broadcasters in order to relieve the unnecessary burdens imposed on them by the so-called *King's Garden* policy.<sup>10</sup> Moreover, because NRB’s proposal attracted a considerable amount of attention (both pro and con) from other commenters, the FCC received the benefit of robust debate on the relevant issues.<sup>11</sup> In the end, the agency adopted much, but not all, of what NRB urged.

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<sup>9</sup> *Id.* at ¶ 49.

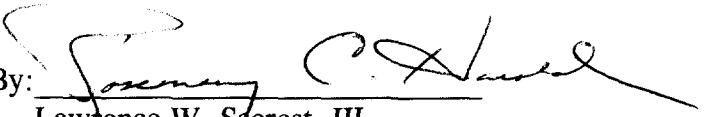
<sup>10</sup> *In re King's Garden, Inc.*, 34 F.C.C. 2d 937 (1972), *aff'd sub nom. King's Garden v. FCC*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). In its comments, NRB identified itself as representing “one such group of distinctly situated broadcasters.” Order and Policy Statement at ¶ 1; *see* NRB Comments at 1 & n.2. It cannot be seriously argued that religious broadcasters do not qualify as “distinctly situated” broadcasters; they are the only group of broadcasters subject to *King's Garden* in the first place. And NRB’s proposals served clearly deregulatory purposes: refashioning the FCC’s EEO nondiscrimination requirement to parallel the treatment accorded to religious entities generally under Title VII of the Civil Rights Act of 1964 would both simplify the legal burdens on licensees and eliminate the potential for improper government entanglement in religious affairs. *See* NRB Comments at 2-4, 11-13.

<sup>11</sup> *See* Comments of the Center for Individual Rights, (filed July 11, 1996) (supporting NRB); Comments of the Christian Legal Society (filed July 11, 1996) (supporting NRB); Comments of the Lutheran Church-Missouri Synod (filed July 11, 1996) (supporting NRB); Reply Comments of the Adventist Radio Network, Inc. (filed Aug. 12, 1996) (supporting NRB); Reply Comments of the American Jewish Committee (filed Aug. 12, 1996) (opposing NRB); Reply Comments of Americans United for the Separation of Church and State (filed Aug. 12, 1996) (opposing NRB) (all filed in MM Docket No. 96-16). A number of the commenters, including NRB, filed on behalf of multiple parties.

Accordingly, the Commission's Order and Policy Statement falls well within the scope of proposals and policy objectives set forth in the Notice. ACLJ's contention that the Order and Policy Statement is infirm on APA grounds should therefore be rejected.

Respectfully submitted,

NATIONAL RELIGIOUS BROADCASTERS

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May 12, 1998

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CERTIFICATE OF SERVICE

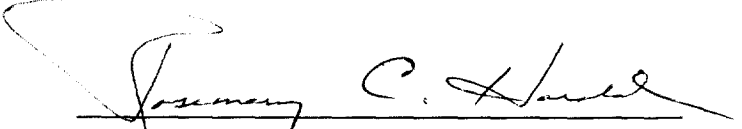
I hereby certify that on this 12th day of May, 1998, I caused copies of the foregoing  
Opposition of National Religious Broadcasters to be sent to the following:

VIA HAND DELIVERY:

Magalie Roman Salas, Secretary  
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